Supreme Court, U.S.
FILED
DEC 29 1992
OFFICE OF THE CLERK

No. 92-751

In the Supreme Court of the United States

OCTOBER TERM, 1992

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; AND THE SNOHOMISH COUNTY HEARING EXAMINER,
Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO BRIEF IN OPPOSITION

SETH R. DAWSON
Prosecuting Attorney
CAROL J. WEIBEL
BARBARA DYKES
Deputy Prosecuting Attorneys
Office of the Prosecuting Attorney, Civil Division
2918 Colby Ave., Ste. 203
Everett, WA 98201
(206) 388-6330

LOUIS R. COHEN
Counsel of Record
LAURA B. AHEARN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Petitioners

TABLE OF AUTHORITIES

	Page
CASES	
Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 738 P.2d 665 (1987)	4
Fisher Properties, Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 726 P.2d 8 (1986)	4
Gagliardi v. Denny's Restaurants, Inc., 117 Wash. 2d 426, 815 P.2d. 1362 (1991)	4
Hensley v. Eckerhart, 461 U.S. 424 (1983)	4
Memphis Community School Dist. v. Stachura, 447 U.S. 299 (1986)	2
Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987)	4
Travis v. Washington Horsebreeder's Association, Inc., 111 Wn.2d 396, 759 P.2d 418 (1988)	4
RULES AND STATUTES	
Sup. Ct. R. 29.1 (1991)	1
Wash. Rev. Code § 64.40.010(4) (1989)	3
Wash. Rev. Code § 64.40.020 (1989)	2
42 U.S.C. § 1983 (1988)	Passim
42 U.S.C. § 1988 (1988)	2, 4

No. 92-751

In the Supreme Court of the United States

OCTOBER TERM, 1992

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; AND THE SNOHOMISH COUNTY HEARING EXAMINER,
Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO BRIEF IN OPPOSITION

Respondent asserts that even if the Washington Supreme Court erred in holding petitioners[1] liable under 42 U.S.C. § 1983, petitioners suffered no "redressable injury" because the state court found petitioners "concurrently" liable

[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioners state that the County of Snohomish is a municipality and, as such, has no parent companies or subsidiaries.

under a state statute. Brief in Opposition at 1. That assertion is wrong: the state court's rulings on federal and state questions were not alternative ways of reaching the same result; they were separate and independent rulings, and they have distinct consequences.

The Washington Supreme Court held petitioners liable under Wash. Rev. Code § 64.40.020 (*see* Pet. App. 4a-23a) and remanded for determination of damages and attorneys' fees under that statute. It then went on (Pet. App. 23a-33a) to hold at some length that petitioner was also liable under 42 U.S.C. § 1983 and remanded for determination of damages under that statute as well, together with attorneys' fees under 42 U.S.C. § 1988. It plainly did not think that the state-law ruling obviated the federal law questions, and it did not suggest that the damages and attorney's fee awards would be the same under both sets of statutes. To the contrary, the extent to which any damage awards would overlap is at best unclear, and any attorney's fee awards would plainly cover distinct legal services.

Petitioners thus have good pocketbook reasons to challenge the state court's serious misreading of federal law.

Section 1983 provides a federal remedy only for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The measure of damages recoverable under § 1983 is a matter of federal law, generally derived from common law principles of tort. *Memphis Community School Dist. v. Stachura*, 447 U.S. 299, 306 (1986). The measure of damages for violation of the state statute is governed by state statutory law. The pertinent Washington statute defines "damages" as follows:

> "Damages" means reasonable expenses and losses, other than speculative losses or profits, incurred between the time the cause of action arises and the time a holder of an interest in

> real property is granted relief as provided in RCW 64.40.020. Damages must be caused by an act, necessarily incurred, and actually suffered, realized, or extended, but are not based upon diminution in value of or damage to real property, or litigation expenses.

Wash. Rev. Code. § 64.40.010(4) (1989) (Pet. App. 239-a). This statute has never been interpreted by a court of record, so the meanings under state law of the numerous limitations it imposes are unclear: "reasonable expenses and losses"; "other than speculative losses"; "necessarily incurred" between two specified points in time; "caused by an act [rather than an omission]"; and "not based upon diminution in value of or damage to real property." However a Washington court may interpret these statutory provisions, federal damages for a violation of § 1983 would not be subject to these statutorily-prescribed limitations.

The point about damages is closely related to the Washington Supreme Court's central error in this case. The state statute, as conclusively interpreted by that court, awards damages for land-use permitting actions that are arbitrary and capricious in the administrative law sense: the state court squarely held (Pet. App. 19a-23a) that an earlier determination that petitioners' denial of a conditional use permit should be reversed as arbitrary and capricious automatically established liability to respondent for damages. If that is the substantive law in Washington, a narrow delimitation of damage awards may well be appropriate. But the state court then held that the same earlier determination automatically established liability under Section 1983 as well, exposing petitioners to damage liability measured as if there had been a genuine deprivation of

federal constitutional rights. Petitioners have good reason to ask this Court to reverse that error.

In addition, the amount awarded as attorneys' fees against petitioners plainly does depend on the validity of respondent's federal law claim. The prevailing party in a Section 1983 case is entitled, under 42 U.S.C. § 1988, to an award of attorneys' fees for efforts expended in successfully pursuing that federal claim. *E.g.*, *Hensley v. Eckerhart*, 461 U.S. 424 (1983). If respondent was not entitled to prevail on that claim, it is not entitled to attorneys' fees for those efforts, because Washington law does not provide for an award of attorneys' fees for the unsuccessful pursuit of a federal claim. To the contrary, Washington law would clearly require segregation of, and would clearly deny compensation for, lawyer hours spent unsuccessfully pursuing a federal claim, even where a state-law claim is successful. *See Gagliardi v. Denny's Restaurants, Inc.*, 117 Wash. 2d 426, 450, 815 P.2d. 1362, 1375 (1991):

> Segregation is required where attorney's fees are authorized for only some of the claims. *See Travis v. Washington Horsebreeder's Association, Inc.*, 111 Wn.2d 396, 410-11, 759 P.2d 418 (1988) (although claims overlap, the trial court must separate the time spent on the issues for which attorney fees are authorized from time spent on other issues); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987) (attorney fees should be awarded only for those services related to the cause of action which allows for fees); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987) (attorney fees should only represent reasonable amount of time and effort expended on claim for which fees are authorized); *Fisher*

Properties, Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986) (when a party recovers both on claims for which fees are authorized and claims for which there is no authorization, it is proper to limit the award to legal services provided on former claims).

In sum, the Washington Supreme Court's instruction that attorneys' fees be awarded on remand for the effort expended in pursuing the Section 1983 claim gives rise to an additional "redressable injury" that compels petitioners to challenge that court's erroneous constitutional ruling.

CONCLUSION

For the reasons stated in our petition and in this brief, the petition should be granted.

Respectfully submitted,

SETH R. DAWSON
Prosecuting Attorney
CAROL J. WEIBEL
BARBARA DYKES
Deputy Prosecuting Attorneys
Office of the Prosecuting Attorney, Civil Division
2918 Colby Ave., Ste. 203
Everett, WA 98201
(206) 388-6330

LOUIS R. COHEN
Counsel of Record
LAURA B. AHEARN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Petitioners